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No. 81-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID R. HARRIS, Superintendent, Green Haven Correctional Facility,

Petitioner,

against

JOSE RIVERA, a/k/a ARAMIS FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SHIRLEY ADELSON SIEGEL
Solicitor General

CLEMENT H. BERNE
Assistant Attorney General
of Counsel

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One week after the petition for *certiorari* was docketed, the Ninth Circuit, citing the reasoning of the Second Circuit decision in the present case, remanded a direct federal appeal for an explanation of what the court found to be logically irreconcilable verdicts. *United States* v. *Duz-Mor Diagnostic Laboratory,* 650 F. 2d 223 (9th Cir. 1981). Thus, the Ninth Circuit has now ratified the Second Circuit's creation of a new constitutional guarantee by elevating the question of whether to prohibit logically inconsistent verdicts to one of fundamental fairness and by expanding the application of the doctrine from verdicts that

are logically inconsistent to those whose reasoning is not sufficiently obvious. This reliance upon the concededly novel holding below illustrates its direct impact upon all multi-count or multi-defendant state and federal criminal prosecutions and further demonstrates the need for plenary review by this Court.*

Respondent erroneously suggests that after *United States* v. *Duz-Mor Diagnostic Laboratory, supra,* there are no longer conflicting rulings on the question whether the Constitution requires the trial court to provide a written explanation of its verdicts under certain circumstances when the criminal defendant has waived his right to trial by jury (Brief in Opposition at 9). The *Duz-Mor* court, however, citing the holding of *United States* v. *West,* 549

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* *Duz-Mor,* unlike the present case, is an appeal from a *federal* criminal prosecution. While the court purported to base its holding upon the due process clause, like the court below, it examined the policies supporting the need for explanation of facially inconsistent verdicts from the viewpoint of sound judicial practice. Indeed, the court explicitly stated that whether or not consistency is constitutionally required, as a federal appellate court it could require the explanation in the exercise of its supervisory power. *Id.* 650 F. 2d at 226 and n. 2. In contrast, before a federal court will disturb a state court conviction, as was done by the court below, it must be established not merely that the trial court engaged in some "undesirable, erroneous, or even 'universally condemned' practice", but that it violated a right guaranteed by the Fourteenth Amendment to assure a fundamentally fair trial. *Cupp.* v. *Naughten,* 414 U.S. 141, 146 (1973).

Even if *Duz-Mor* were correctly decided, it does not follow that the decision below was correct. For in *Duz-Mor* the corporate defendant, but not "the only human agent representing the corporation in the challenged transaction," was convicted of Medicare fraud. *Id.,* 650 F.2d at 225. Thus, like *United States* v. *Maybury,* 274 F.2d 899 (2d Cir. 1960), but unlike *United States* v. *Wilson,* 342 F.2d 43 (2d Cir. 1965), the verdicts were logically irreconcilable. (See Petition, at 10-11.) In the present case, two defendants were convicted and one was acquitted on the basis of concededly different evidence. (See Brief in Opposition, at 3-5.) The only substantive question was whether this difference was sufficient to permit the verdict to stand.

F.2d 545, 553 (8th Cir.), *cert denied*, 430 U.S. 956 (1977), as an example, recognized that, "The other circuits do not agree on the effect of inconsistent 'verdicts' in bench trials." 650 F. 2d at 225. Respondent dismisses as dictum the refusal of the Eighth Circuit in *United States* v. *West, supra,* at 553, to impose a consistency requirement upon bench trial verdicts. But respondent's argument is of no relevance here, where the question is whether the courts in various circuits are operating under substantially different definitions of what constitutes a fundamentally fair trial.

The rights of criminal defendants in multi-count or multi-defendant actions are now notably different depending upon the circuit in which they are tried. The unconditional language in *United States* v. *West, supra,* informs the state courts within the Eighth Circuit that they need not make findings of fact after bench trials. In the present case, the Second Circuit has mandated such findings by state courts in New York, Connecticut and Vermont. By relying upon this decision, the Ninth Circuit in *Duz-Mor* suggests that it would impose the requirement upon state as well as federal trial courts. But because of the conflict between *Duz-Mor* and *McElheny* v. *United States,* 146 F. 2d 932 (9th Cir. 1944), and because those cases are direct federal appeals, the state courts within the Ninth Circuit are in a quandary. Given this confused and conflicting guidance, trial courts throughout the country require the conclusive interpretation of the Constitution that only this Court can provide.

Finally, the basis for the appearance of inconsistency set forth in the Brief in Opposition, at 7, is grounded upon a fundamental misunderstanding of the elements of third degree burglary (New York Penal Law § 140.20). Under the mistaken belief that to convict a defendant of this crime the trier of fact must find an unlawful entry, respondent is unable to reconcile what he presumes was the trial court's finding that the evidence did not establish such an entry

beyond a reasonable doubt and its further finding of guilt.* Under Penal Law § 140.20, however, a person is guilty of burglary in the third degree "when he knowingly enters or *remains* unlawfully in a building with intent to commit a crime therein." (emphasis added). Thus, when a person enters premises lawfully, but remains with the intent to commit a crime after permission to stay has been withdrawn, he is guilty of burglary in the third degree. Penal Law §§ 140.00(5), 140.20. See *People* v. *Licata*, 28 N Y 2d 113, 117 (1971). Accordingly, the trial court's determination that the evidence adduced at trial did not prove beyond a reasonable doubt that Robinson helped Rivera unlawfully enter the victim's apartment was not inconsistent with its determination that Rivera was guilty of burglary in the third degree.

Dated: New York, New York
September 14, 1981

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner

SHIRLEY ADELSON SIEGEL
Solicitor General

CLEMENT H. BERNE
Assistant Attorney General
of Counsel

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* The court below ignored the significance of circumstantial evidence of an unlawful entry—the blocking of the neighbor's peephole—which the trial court could have believed was done by Rivera and Humdy, without Robinson's knowledge. 643 F. 2d at 88 (Petition, App. B 4).